United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 14, 2006

TO : Rochelle Kentov, Regional Director
Region 12

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: IATSE Local 835
(Shepard Exposition Services, Inc.)
Case 12-CB-5485 536-2545
536-2545-1200
536-2581
536-2581-3314
536-2581-6767-7800
536-5050-3385
536-5050-3387
548-2067
548-6030
548-6030-3380
548-6030-6725
548-6030-6725-9900
548-6070-0150

The Region submitted this Section 8(b)(1)(A) and (2) duty of fair representation case for advice as to whether the Union had a legitimate interest in strictly adhering to its hiring hall rules by permanently removing Charging Party Dennis McAuley from its exclusive hiring hall referral list.

We conclude that the Union's legitimate interest in promoting the efficiency and integrity of its hiring hall privileged the Union to permanently remove McAuley from the hiring hall referral list for having consciously disregarded its valid hiring hall rules.

FACTS

Shepard Exposition Services, Inc. (Shepard) is an exhibition and trade show industry general services contractor. Shepard and IATSE Local 835 (the Union) are parties to a collective-bargaining agreement effective by its terms from July 1, 2004 through October 1, 2008. The parties' contract requires Shepard to fill all of its labor needs through employees the Union refers from its Orlando, Florida exclusive hiring hall. Although Shepard may request as many as half the employees needed on a given call by name, any such "name-requested" employees must still be referred for employment through the hiring hall. The Union fills remaining positions from among its hiring hall registrants based on their skills and seniority.

When filling an employer's labor request, the Union creates a job roster of the referents assigned to a job, including any name-requested employees. A Union job steward brings a copy of the roster to the work site and uses it to sign employees in and out each day.

As relevant here, the Union's hiring hall rules provide as follows:

> Article VII. Suspension and Removal from the Referral List.
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> The Union may suspend or remove individuals from the referral list as follows:
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> 3. Referents obtaining trade show and convention work within the Union's jurisdiction without being referred by the Union or without the permission of the Business Representative will be removed immediately from the list.
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> Article VIII. Disciplinary Code
>
> 2. List of Offenses
>
> A. Major Offenses
>
> 6. Threatening harm to any employee, job steward, or Union official while at work, or in connection with work.
>
> B. Minor Offenses
>
> 3. Violation of health and safety rules set forth by the Union.[1]

Charging Party Dennis McAuley resigned his Union membership in 2001 but remained a registered hiring hall user.[2] McAuley signed the Union's "Application and Authorization for Referral" form in 1999 acknowledging, among other things, that he had received a copy of the Union's referral rules. As set forth in greater detail below, the Union permanently barred McAuley from its hiring

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[1] Under Article VIII, a first major offense is punishable by a one-year suspension, while a first minor offense is punishable by a $60 fine.

[2] McCauley is also a long-time member of New Orleans-based IATSE Local 39.

hall on December 30, 2004[3] because he circumvented the Union's referral procedures and obtained work directly from Shepard.

On November 9, Shepard submitted a labor request to the Union for six employees, including McAuley, whom Shepard requested by name, for a job (the AAP show) slated to begin on November 11. Shepard mistakenly canceled this call on November 10. The Union, in turn, apprised McAuley of this and referred him to another job (the ITA show) set to begin on November 11.

McAuley experienced car trouble on his way to the ITA show, however, and he called the Union to advise that he would be unable to report to it. After returning home, McAuley spoke by telephone with Shepard supervisor Keith Averitt. Averitt, unaware Shepard had canceled the AAP show request, asked McAuley why he had not reported to work. When McAuley explained that Shepard had canceled the request, Averitt said the Union must have made a mistake, and that because McAuley had been name-requested and Shepard was understaffed, McAuley should report to the job. According to McAuley, Averitt stated that he would explain the situation to the Union later, but Averitt does not remember saying this. Averitt admits that he erred by telling McAuley to report to the job rather than contacting the Union to request McAuley by name.

McAuley signed in to work on the AAP show at 1 p.m. on November 11, and worked that day and the following two days installing exhibits.[4] It is undisputed that McAuley's name was not on the AAP show installation job roster. However, according to McAuley, he signed in on November 11 with Union job steward Jack Smiley without incident. Smiley claimed that not until the next day, November 12, did he realize that McAuley's name was not on the job roster. Smiley avers that after learning that Shepard wanted to keep McAuley, Smiley added him to the roster as a "walk on."

On November 12, Smiley received various complaints from co-workers about McAuley, including an allegation that he suddenly and without warning lowered a scissor lift while two employees were standing on it. Based on these complaints, Smiley told McAuley to leave the jobsite. McAuley called Averitt on his way out of the show. Averitt

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[3] All dates are 2004 unless otherwise indicated.

[4] Pursuant to a clearly proper hiring hall referral, McAuley later also worked for Shepard on November 16 and 17 dismantling AAP show exhibits.

told him to return because Shepard was behind schedule. McAuley did so, working until 4 a.m. on November 13.

When McAuley arrived to sign in for work at the AAP show later on the morning of November 13, Smiley refused to let him do so because his name was not included on the job roster. Smiley claims that he spoke to Averitt, who said that Shepard wanted McAuley back. Smiley replied that Shepard should have requested McAuley through the hiring hall, and later reiterated that he would not permit McAuley to work because Shepard had not followed the requisite referral procedures.

Smiley eventually submitted a written report to the Union about events at the AAP show. The report recounted, inter alia, that McAuley worked the AAP show despite not being on the job roster after speaking directly with Averitt; that Smiley sent McAuley home after the scissor lift incident on November 12; and that McAuley returned to the job later that day and worked into the early morning hours of November 13.

On December 30 the Union gave McAuley written notice that it had removed him from the Union's referral list for violating Articles VII(3) and VIII(2)(A)(6) of the Union's hiring hall rules. The letter included copies of Smiley's report and the co-workers' complaints.

McAuley timely filed a written appeal of the Union's decision. He asserted that Averitt called him, asked him to come in, and stated that he would "straighten things out" with the Union. He also contended that the scissor lift was malfunctioning and that he lowered it only because it was unsafe. Though McAuley admitted that Smiley asked him to leave, he claimed that Smiley told him to report back the following morning. Finally, he stated that after leaving, as Smiley directed, Averitt asked him to return, which he did, working into the early morning hours of November 13.

The Union's Referral Hall Committee (RHC) considered the allegations against McAuley at a hearing in February 2005. McAuley contends he was never notified of the RHC hearing. The Union's hiring hall rules provide that an appellant should indicate in his appeal if he wishes to appear in person before the RHC, in which case the RHC will notify the appellant of the date, time, and place of the hearing. McAuley did not invoke this right and, accordingly, did not receive notice of the RHC hearing.

According to RHC member Rick White, the RHC determined that McAuley had admitted in his appeal that he obtained work on the AAP show by circumventing the Union's referral

procedures. The RHC also considered the allegations concerning the scissor lift and found that McAuley violated the hiring hall's safety rules, Article VIII(2)(B)(3). Based on its findings, the RHC decided to remove McAuley from the Union's referral list, as provided in Article VII(3). On March 3, 2005, the Union notified McAuley that it had denied his appeal and upheld the penalty it imposed on December 30.[5] McAuley did not appeal the RHC's findings to the International.

On June 5, 2005 the Union filed a grievance against Shepard concerning its hiring McAuley on the AAP show directly. To date, however, Shepard has not responded to it.

ACTION

The Union's legitimate interest in promoting the efficiency and integrity of its hiring hall was sufficient to allow the Union to permanently remove McAuley from the hiring hall referral list for having consciously disregarded valid hiring hall rules.

A union violates its duty of fair representation if, in light of the factual and legal landscape at the time of its actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational.[6] A union owes a duty of fair representation to all applicants using its exclusive hiring hall[7] and may not operate it in an arbitrary or unfair manner.[8]

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[5] The Union's December 30 letter to McAuley, referenced in its March 3, 2005 correspondence, indicated that the Union determined that McAuley had violated Article VII(3) and Article VIII(2)(A)(6) of the hiring hall rules, while White indicated that the RHC found him guilty of violating Article VII(3) and Article VIII(2)(B)(3) of the hiring hall rules. This inconsistency is apparently of no consequence, however, since the gravamen of McAuley's unfair labor practice charge concerns the Union's action with respect to the Article VII(3) violation.

[6] Air Line Pilots v. O'Neill, 499 U.S. 65, 67 (1991), quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

[7] See Breininger v. Sheet Metal Workers Local 6, 493 U.S. 67, 73 (1989).

[8] See Miranda Fuel Co., 140 NLRB 181, 184 (1962).

When a union operating an exclusive hiring hall prevents an employee from being hired or causes an employee's discharge, the Board presumes that this action unlawfully encourages union membership because the union has demonstrated its power over the employee's livelihood.[9] A union may overcome this presumption by showing that its action was necessary to further a legitimate hiring hall purpose.[10] For example, a union may lawfully refuse to refer an individual for quitting a previous job, for excessive absenteeism, or for acting as an employer, because the union in each case is promoting the efficiency and integrity of its hiring hall operation.[11]

The Board has also long held that a union may legitimately refuse to refer a hiring hall applicant to prevent the circumvention of its exclusive hiring hall.[12] In Boilermakers Local Lodge No. 40, the Board found that the union lawfully suspended an employee who had applied for work directly with an employer, contrary to the union's written hiring hall rule. The Board expressly approved of the union's decision to strictly enforce its rule against self-referrals as a lawful means of protecting its legitimate interest in ensuring a fair referral system.[13]

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[9] See, e.g., Boilermakers Local Lodge No. 40 (Envirotech Corp.), 266 NLRB 432, 433 and cases cited at n.4 (1983).

[10] Id. at 433, citing Operating Engineers Local 18 (Ohio Contractors Assn.), 204 NLRB 681, 681 (1973), enf. denied on other grounds 496 F.2d 1308 (6th Cir. 1974).

[11] Id. at 433 and cases there cited.

[12] Ibid.

[13] Ibid. See also Carpenters Local 522 (Caudle-Hyatt), 269 NLRB 574, 576 (1984) (Board upheld ALJ's finding that union lawfully demanded two employees who circumvented hiring hall to obtain work be discharged; ALJ noted there was no reason to doubt the employees made good faith efforts to reach the union and obtain clearance to work, but found that those efforts, the fact the union had previously referred them for work, the employer's message that they should secure union clearance, and the fact that one employee acknowledged receiving a copy of the contract containing the hiring procedure, demonstrated that they were aware of the need to secure a referral before working; absent evidence of unlawful motive or departure from past practice or contractual provisions, union acted reasonably to prevent circumvention of legitimate hiring hall). Cf. IATSE Local 7 (Universal City Studios, Inc.), 254 NLRB 1139, 1139 (1981)

Finally, once the Board concludes that a union has refused to refer an employee from its hiring hall for legitimate, nondiscriminatory reasons, the Board will not scrutinize the severity of the punishment imposed.[14]

Two circuit courts of appeals have held that a union owes a "heightened duty" of fair dealing toward employees in the hiring hall context that requires it to act by reference to objective criteria.[15] In Jacoby, the union negligently referred several lower-priority hiring hall registrants ahead of the charging party. The District of Columbia Circuit refused to uphold the Board's finding that the union's departure from its hiring hall criteria constituted neither a breach of its duty of fair representation nor a Section 8(b)(1)(A) and (2) violation.[16] In Lucas, the union expelled an individual from its hiring hall for his purported 15-year record of misconduct, and later denied him readmission without reference to any specific written hiring hall policy.[17] Because the Board's dismissal relied on evidence not in the record, the Ninth Circuit found that its decision, that the union acted in a manner necessary to effectively operate its hiring hall, was unsupported by substantial evidence.[18] The Board has not, however, adopted the "heightened duty" standard.[19]

(union violated Section 8(b)(2) where it refused to refer employees who made repeated good faith efforts to contact union's business agent, went to jobsite and waited for two hours while union steward tried to reach business agent, and left jobsite without working; in such circumstances, employees' appearance at jobsite prior to receiving a referral could not be viewed as a circumvention of hiring hall procedures). The Board noted in dictum that there was no evidence hiring the pair would have disrupted the usual determination of employee referrals because the employer was permitted to make name requests, and had specifically requested the employees at issue. Id. at 1139-1140.

[14] Boilermakers Local Lodge No. 40 at 433.

[15] See Jacoby v. NLRB, 233 F.3d 611, 615-617 (D.C. Cir. 2000), reversing and remanding 329 NLRB 688 (1999); and Lucas v. NLRB, 333 F.3d 927, 934-935 (9th Cir. 2003), reversing and remanding 332 NLRB 1 (2000).

[16] 233 F.3d at 617-618.

[17] 333 F.3d at 929.

[18] 333 F.3d at 936-937. Because of this determination, the court did not reach the issue of whether the union's failure

Applying these principles here, we conclude that the Union treated McAuley lawfully. McAuley, a former Union member, current Local 39 member, and long-time hiring hall referent, acknowledged receiving a copy of the Union's hiring hall rules, which prohibit employees from obtaining work directly from employers like Shepard, and prescribe the penalty for doing so -- removal from the Union's hiring hall referral list. Board law plainly permits the Union to establish and maintain such provisions.[20] It is also undisputed that McAuley knowingly violated the Union's prohibition against self-referrals twice, first on November 11 and again on the afternoon of November 12. Thus, even assuming the veracity of McAuley's claim that on November 11 Averitt told McAuley he would explain the situation to the Union later, we would find that the Union lawfully disciplined McAuley.[21] That the Union was acting in good faith is confirmed by its having also filed a grievance against Shepard for the Company's failure to adhere to the hiring hall procedure.[22]

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to rely on any objective criteria constituted a separate basis for finding that it had breached its duty of fair representation. 333 F.3d at 936 n.10.

[19] See Teamsters Local 631 (Vosburg Equipment, Inc.), 340 NLRB 881, 881 n.4 (2003).

[20] See Boilermakers Local Lodge No. 40, 266 NLRB at 433; and Carpenters Local 522, 269 NLRB at 576. See also Teamsters Local 357 v. NLRB, 365 U.S. 667, 677 (1961) (Board's power over hiring halls is confined to seeing they are not discriminatorily administered; if hiring halls are to be subjected to greater regulation, Congress, not the Board, is the appropriate entity to do so).

[21] See Carpenters Local 522, 269 NLRB at 576 (finding that union acted lawfully where, inter alia, employee knew of need to secure referral prior to starting work).

[22] We do not read the Board's dictum in IATSE Local 7, above at n.13, to suggest that a union may only sanction an individual for violating an otherwise legitimate hiring hall rule when another employee is disadvantaged by the disciplined employee's circumvention of the rule. Thus, we do not consider dispositive the fact that McAuley was initially name-requested on the November 9 call that Shepard erroneously canceled, or the fact that the Union would have referred McAuley if Shepard had subsequently requested McAuley by name instead of Averitt directly asking him to return to work on the afternoon of November 12.

We also conclude that the Union's actions here satisfy the District of Columbia and Ninth circuits' "heightened duty" standard. The Union acted pursuant to objective criteria in order to effectively perform its representative function,[23] which plainly encompasses enforcing its legitimate, non-discriminatory hiring hall rules against an individual and employer who knowingly violated them. Unlike in Jacoby where the union departed from its hiring hall rules, or in Lucas where the union acted without reference to any specific written hiring hall rules, the Union applied its existing hiring hall rules in McAuley's case. In this context, there is essentially no difference between the Board's and the courts' duty of fair representation standards because both require that a union act objectively in furtherance of a legitimate interest. The Union's conduct toward McAuley thus satisfies both standards.

We also note that there is no evidence that the Union acted against McAuley for any invidious reason such as racial or age bias, or because he is not a Union member. In fact, the record belies any argument that McAuley's non-Union status colored the Union's treatment of him, since the Union referred McAuley to work for Shepard dismantling AAP show exhibits on November 16 and 17. Because we conclude that McAuley was disciplined for legitimate, non-discriminatory reasons pursuant to published, known, and available rules, we need not consider the severity of the Union's punishment.[24]

Finally, we conclude that the Union afforded McAuley adequate due process even though it did not inform him of the date of the RHC hearing. The Union notified McAuley in writing about the allegations against him, included copies of Smiley's report and the complaints his co-workers had lodged against him, granted him an opportunity to respond, and considered his position at the RHC hearing.[25] In his appeal, however, McAuley did not invoke his right to appear at the RHC hearing. Pursuant to the Union's hiring hall

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[23] See Jacoby, 233 F.3d at 615-617; and Lucas, 333 F.3d at 934-935.

[24] See Boilermakers Local Lodge No. 40, 266 NLRB at 433.

[25] See generally Boilermakers Local Lodge No. 40, 266 NLRB at 432 (Board noted without disagreement that ALJ rejected the General Counsel's contention that the union failed to investigate the subject incident prior to suspending the employee, finding that the union reasonably relied upon a letter from the employer describing the events in issue).

rules -- which McAuley acknowledged receiving -- the Union was thus not obligated to notify him of the RHC hearing date. In these circumstances, we cannot find that the Union denied McAuley due process.

For all the foregoing reasons, we conclude that the Union did not breach its duty of fair representation in violation of Section 8(b)(1)(A) and (2).

B.J.K.